85-2020

Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

_____

EDWARD C. EMBURY, JR., pro se,

Petitioner,

- v. -

COLORADO SUPREME COURT, et al.

and

COLORADO COURT OF APPEALS, et al.,

Respondents.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

_____

EDWARD C. EMBURY, JR., pro se
2237 Emerson Street
Denver, CO 80205
(303) 861-4423

Petitioner

54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is not the petitioner's complaint, alleging that the conduct of the respondents in relying upon an unpublished rule without notice, violates federally protected rights of procedural due process, appropriate as a 42 USC §1983 cause of action?

Where the central and undisputed fact of this case is that the respondents, in the face of valid state law requirements that the rules of all courts be promulgated, regularly undertake the consideration of a certain class of cases by means of an unpublished rule, without notice to the affected litigant of this special practice or the

rule's content. And, where the petitioner has alleged that he relied upon the terms of the promulgated rule in electing to appear personally, and has further alleged that by so proceeding, respondents violated his federally protected rights:

> To notice of the conditions under which his appeal will be considered;
>
> to rely on the rules of procedure as promulgated;
>
> and, as a civil litigant, to make an informed and knowledgeable decision in choosing between his alternative fundamental rights to appear personally or by counsel.

2. Is the rule at issue, which operates as a non-discretionary prohibition precluding any consideration of a case for oral argument wherein a party is a lay litigant appearing personally, based upon the litigant's lay status and not the merits, and from which prohibition attorneys so appearing are exempt, violative of federally protected rights of due process and equal protection enjoyed by the affected litigant?

Where the respondents in all other matters enforce the well-established rule that lay litigants are to be held to the same rules of procedure as are attorneys. And further, the cases relied upon by the Tenth Circuit in support of the rule

indicate that in civil cases, upon a discretionary determination that the issues do not warrant oral argument, it may be denied, and are unsupportive of wholesale, non-discretionary administration of oral argument.

LIST OF PARTIES [and or] RULE 28.1 LIST

The parties to the proceedings below were the petitioner Edward C. Embury, Jr. and the respondents The Colorado Supreme Court; and the Hon. Paul V. Hodges, former Chief Justice Retired; Hon. Wm. H. Erickson, Chief Justice; Hon. Luis D. Rovira; Hon. Jean Dubofsky; Hon. Geo. E. Lohr; Hon. Joseph Quinn; Hon. Howard M. Kirshbaum; Hon. Wm. D. Neighbors; Justices of the Colorado Supreme Court, and, The Colorado Court of Appeals and The Hon. David W. Enoch, Chief Judge; Hon. Chas. D. Pierce; Hon. Donald P. Smith; Hon. Norman E. Berman; Hon. Edwin P. Van Cise; Hon. Aurel M. Kelly; Hon. Alan L. Sternberg; Hon. Dal. P. Tursi; Hon. Lewis T. Babcock; Hon. Karen S. Metzger; Judges of the Colorado Court of Appeals; Hon. Howard M. Kirshbaum, former Judge of the Colorado Court of Appeals.

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The petitioner Edward C. Embury, Jr. respectfully prays that a writ certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on December 4, 1985.

OPINIONS BELOW

The order of the Tenth Circuit U.S. Court of Appeals and the order of the U.S. District Court, District of Colorado (Kane, J.) are unreported. Both are reprinted in the appendix hereto.

JURISDICTION

Invoking jurisdition under 42 USC §1983, petitioner brought this action in the U.S. District Court, District of Colorado. The District Court dismissed petitioner's action pursuant to respondent's motion under Rule 12, (b), (6), on November 30, 1984.

Petitioner perfected an appeal to the Tenth Circuit U.S. Court of Appeals

which court entered its order affirming the dismissal of petitioner's action on December 4, 1985. A petition for rehearing en banc was timely filed and was denied on March 13, 1986, without opinion. The time for filing this petition for rehearing extends to and including June 11, 1986.

The jurisdiction of this court is invoked under 28 USC §2101, (c).

CONSTITUTIONAL PROVISIONS, STATUTE, RULE

This action invokes relief pursuant to the Fifth and Fourteenth Amendments Sec. 1, to the U.S. Constitution; 42 USC § 1983; Colorado Constitution, Art. VI, Sec. 21; Colorado Appellate Rule 34(b).

STATEMENT OF THE CASE

Petitioner is, and was at all times herein, a resident of Denver, Colorado

and U.S. Citizen. On July 20, 1984, he instituted this action pursuant to 42 USC § 1983 for equitable relief and damages against the respondents. The matters which give rise to this action occurred during petitioner's personal appearance as an appellant in the respondent Colorado Court of Appeals and thereafter in matters occurring within the respondent Colorado Supreme Court.

Petitioner appeared personally as defendant in a civil action for breach of contract in Denver District Court. His appearance personally was motivated by his financial situation; having some years earlier entered a land contract to purchase an older home, this asset disqualified him for legal aid, and his low income left him unable to obtain a loan with which to retain counsel. If he

retained counsel and failed to prevail, his debt would double by the amount he would owe counsel. The Plaintiff, an attorney, had previously rejected settlement. Petitioner lost at trial. After consultation with attorneys about his case, petitioner elected to proceed on appeal and to appear personally.

His decision to do so was made in view of facts material to this case: the attorneys he had consulted related that it was generally acknowledged that the respondent Court of Appeals customarily affords oral argument; the promulgated rule contained no restrictions that would bar his access to that procedure which he considered important to the successful prosecution of the appeal due to the complex factual nature of the matters on review, including modifications of the

disputed contract, and proceedings at trial held off the record; and the knowledge acquired at trial that as a lay litigant he was subject to the same rules of procedure as were attorneys. What he did not then know was that in electing to appear personally, the respondent Court of Appeals would invoke an unpublished rule upon which it regularly relies as a matter of policy and which rule abrogates the terms of Colorado Appellate Rule 34 which governs oral argument.

The exact date or point in time at which petitioner first learned that the policy of the court was not to consider cases involving lay litigants for oral argument is uncertain in the recollection of those involved. What is agreed, however, and is the relevant point here, is that it was in informal conversation

with the court clerk and personnel of that office, and that it was during the pendancy of the case. Petitioner would emphasize it was after his appearance had already been entered personally, in reliance upon the rule as promulgated.

It is a matter of record that petitioner requested oral argument in his brief. This request was never acknowledged. The petition for rehearing, wherein he specifically objected to the unpublished rule, was timely filed and was denied without opinion. Subsequently, petitioner challenged the reliance of the Court of Appeals on the unpublished rule in a petition for certiorari in the respondent Colorado Supreme Court which was denied without opinion. Petitioner filed an original action on February 15, 1983 in the respondent Colorado Supreme

Court wherein he specifically raised, inter alia, the issue of the state law requirements that rules of courts be promulgated. It was at or about this time petitioner learned that the respondent Colorado Supreme Court enforced an identical policy, and similarly, without notice. This original action was dismissed without opinion two days later on February 17, 1983. These facts do not appear in the lower court opinions. Petitioner, having thus exhausted all state remedies, then sought relief in the federal courts.

Petitioner's complaint alleged inter alia, that the respondent courts customarily rely on an unpublished rule in cases where a litigant appears personally and is a layman, and that the rule prohibits any consideration for oral argu-

ment in all such cases. Further, petitioner alleged that in being unpublished, the rule violated state law requirements that the rules of all courts be promulgated and was therefore invalid. It was also alleged as violative of his right to make an informed decision in electing to appear personally or by counsel, being applied without notice. The respondents entered a motion to dismiss under Rule 12, (b), (6).

Neither that motion, nor the District Court's order dismissing petitioner's case, entered November 30, 1984, ever reached these allegations. Rather dismissal was sought, and granted, on a matter which was not at issue; that the constitution and laws contain no guarantee to oral argument of an appellate case, and which petitioner had never

alleged. The District Court relied on the case of Parratt v. Taylor, 451 U.S. 527 (1981) in holding that the established and customary conduct of the respondents did not deprive petitioner of any federal rights. In the summary dismissal of petitioner's case, the District Court refused both the petitioner's request for a hearing and his request for permission to brief.

Petitioner perfected an appeal of the District Court's order of dismissal to the Tenth Circuit U.S. Court of Appeals. The Tenth Circuit affirmed the dismissal of petitioner's action on December 4, 1986. It's affirmance was similarly grounded upon the lack of any federal guarantee of oral argument, and while its order did reach the fact that the rule is unpromulgated, it held that

the litigant's right to notice of the conditions under which an appeal will be considered is purely a state law issue and balanced any violation against the fact that both parties had an opportunity to brief without oral argument. However, the Tenth Circuit's order did not reach the issue of the impact of the rule on petitioner's ability to make an informed choice of appearance. Under the facts, the current posture of this case is that the order of neither of the lower courts fully meets the issues involved.

Petitioner's petition for rehearing was denied without opinion on March 13, 1986.

REASONS FOR GRANTING THIS WRIT

I.

The order of the Tenth Circuit

sanctions a departure from accepted judicial practice which threatens public confidence in the courts and is contrary to public policy and traditions.

The Tenth Circuit's order sustains the right of the Colorado appellate courts to proceed in reliance upon unpublished rules in violation of state law, to disregard those they promulgate and to do so without notice. The respondents assert in their motion to dismiss that this right arises from their right to control the management of their own docket. They make no showing that their conduct is necessary to achieve that legitimate goal, or that it is reasonable. The District Court's order expands on the theory of efficiency implicit in the motion to dismiss. The District Court's statement however, that,

> "A rule precluding oral argument when any one of the parties is a layman appearing pro se operates as much for the advantage of the untrained litigant as it does for the efficient conduct of the court's business." (Order, p.9a),

fails to consider or explain how the affected litigant enjoys any advantage when he is given no notice of the rule, nor does it explain how, when under other circumstances his case might well be determined to warrant oral argument in order that it be properly considered, precluding any such determination would provide any benefit. Unarguably, the advantage of the rule goes to efficiency. However,

> "...the fact that a given law or procedure is efficient, convenient, and useful in facilitating the functions of government, standing alone, will not save it if it is

> contrary to the Constitution." INS v. Chadha; 103 S.Ct. 2764, 2780-2781 (1983).

Over fifty years ago this court noted,

> "[Any state] is free to regulate the procedure of its courts in accordance with its own concepts of policy and fairness unless in so doing it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 US 97, 105 (1933).

Petitioner believes that this is such a case. His reliance upon the rules was instinct born of the policy and tradition of our society and laws that above all others the courts must and do observe the law, and not of any specific knowledge that the state constitution requires the rules be promulgated, see; Colorado Constitution, Art. VI, Sec. 21.

At issue here is more than just the individual rights of this petitioner.

All the people, of Colorado and all states must be assured that the rules are before them and that they can be relied upon in any undertaking to preserve their rights and property. Colorado is most certainly not the only state attempting to cope with the real and difficult task of administering burgeoning case loads. These courts must be reminded however, that in undertaking the task the basic rights of the litigants must be taken into account and provided for. The practice here at issue is a customary one applied to all cases of the class. Left to stand, the violations will continue and the practice will exist as a dangerous precedent in further attempts to deal with court management that could well produce other methods at least as violative of the Constitution as this one.

II.

The state law violations alleged in petitioner's complaint constitute violations of federally secured rights appropriate as a §1983 cause of action; and the Tenth Circuit's ruling to the contrary conflicts with applicable decisions of this court and other circuits.

Tenth Circuit stated:

> "Colorado state law may give [petitioner] the right to notice of the conditions under which his appeal will be considered. [Footnote 1, 'The Colorado Constitution directs the state supreme court to "... make and promulgate rules governing practice and procedure in civil ... cases..." Colo. Const. Art. VI, §21 (emphasis added).'] Even if petitioner were to establish a clear state law right to notice concerning the conditions under which he would be granted oral argument however, a federal court could not grant injunctive or monetary relief against the Colorado courts solely because they violated

> state law. See Pennhurst State School v. Halderman, ____ U.S. ____, 104 S.Ct. 900, 919, 921 (1984); Order, p. 2a, 3a.[1]

In considering this statement, it requires emphasis that the Tenth Circuit made no reference to the case law of this court,

> See, e.g.; Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 US 260 (1959); Yellin vs. U.S., 374 US 109 (1962); US v. Ferretti, 635 F2d 1089 (1980).

and others including that of the respondent courts, see e.g.; Motz v. Jammaron, 676 P2d 1211, 1214 (1983); Capitol Industrial Bank. v. Strain 442 P2d 187 (1968), which holds that once promulgated, rules must be observed in order that they can be properly relied upon without harm to those proceeding by

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[1] The respondent Colorado Supreme Court, specifically holds this right is a matter of due process . . . [and] . . . public policy, see; People v. Bobian, 626 P2d 1132. 1135 (1981).

their terms. In all jurisdictions this requirement is denoted as being a matter of due process.

The violation of the requirement of state law in this case that the respondents promulgate their rules is compounded by the respondents' disregard for the promulgated rule, Colorado Appellate Rule 34, upon which terms petitioner had relied and which stated in subsection

> (b): "Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed thirty minutes for oral argument."

The right to rely on the rules of procedure as promulgated, the right to notice of the conditions under which his appeal will be considered, and, that which their proper function ensures - the right to make an intelligent and informed election of appearance, all

arise as requirements of procedural due process.

It is petitioner's view that where these guarantees have been specifically codified in Colorado state law, enacted subsequent to the Fourteenth Amendment's ratification, they reflect the legislative intent that implicit Fifth Amendment rights be clearly identified in order that the state's Fourteenth Amendment duty to provide for their due observance be ensured. And where such state laws as these are violated, especially as here, upon a regular basis, such conduct gives rise to a federal issue, appropriate as a §1983 cause of action.

III.

A rule precluding access to oral argument in civil appellate cases based on a litigant's lay status is violative

of due process and equal protection requirements.

The Tenth Circuit relies on the case of Groendyke Transport, Inc. v. Davis, 406 F2d. 1158, (5th Cir. 1969) in sustaining the rule. They state that under Groendyke, supra,

> "All that [due process] requires is that a party be afforded the opportunity to make an argument . . . on terms equal to those afforded to the opposing party." Order, p. (4)3

Groendyke does not arise out of a situation where either party was subject to a rule which precluded any consideration of the case for oral argument, but was rather the result of the discretionary determination that oral argument was not warranted. What the court overlooked was that it is to secure access to

that very process that this action was before them. The language in Groendyke is supportive of that effort,

> "In these times of exploded and exploding dockets every proper effort must be made to allow courts to hear and decide more cases more expeditiously. Indeed, the due process and equality so cherished is denied by the very process of nominally treating all cases alike." Groendyke supra, 1162 (emphasis added).

Further, the case of FCC v. WJR, the Goodwill Station, 337 US 265 (1949) is on point in this regard,

> "[W]hen . . . procedural due process may require oral argument . . . is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination. [A]ny other approach would be in these respects, highly abstract, indeed largely a vacuum." FCC, supra, 227

The Tenth Circuit case relied on in the order, U.S. v. Marines, 535 F2d. 552 (10th Cir. 1976) cites the FCC case but

that case was not included in the Tenth Circuit order. Clearly it is antithetical to the rule at issue here. The cited cases simply do not say what they need to in order to serve the special purpose the Tenth Circuit intends for them.

The only area wherein this court has held that a litigant's status may justify a denial of access to appear and argue personally, and this upon a prior discretionary determination that the case warranted oral argument, is in the case of prisoners, see; Price v. Johnston, 334 U.S. 266 (1947).

In Price, consideration was given to the fact that the party was an incarcerated prisoner, and in this case no showing has been made that either the number of cases involved or that the character of lay, civil, pro se litigants

is such as to make it reasonably necessary to similarly preclude them access, or to prohibit any consideration of the merits of the case for possible argument. The perspective from which this court viewed the issues in Price was that the entire process is one for discretionary determinations, and the right to appear and argue as otherwise unqualified. Price, 285, 286.

Access to the courts and to the customary remedial processes and protections thereof is particularly important to the civil litigant without a right to counsel, particularly in these times of increasing unavailability of low cost legal aid. No showing has been made by the respondents that in the context of of the courts' workload it is reasonably necessary or anything beyond more

efficient to restrict the right of personal access to the courts and their processes solely to lawyers qualified to practice law in Colorado. Attorneys so qualified may appear personally if they so desire, obtain consideration of their case for oral argument, and participate upon the award of same. The Tenth Circuit did not reach this issue. And also, in supporting the unpublished rule the Tenth Circuit never dealt with the rule that all courts hold the lay litigant subject to the same rules of procedure as are attorneys.

In upholding the policy of respondents at issue, the Tenth Circuit's order conflicts with the considerations expressed in the applicable decisions of this court and those of other circuits.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted. If this honorable court grants this petition, the matter should be remanded to the District Court to proceed upon a properly amended complaint in order that the claims not developed by the evidentiary processes due to the summary dismissal of the case be resolved. Petitioner is, at the very least, entitled to minimal relief in the nature of an order of this honorable court directing that the respondents properly promulgate the unpublished rule at issue. Without this grant of relief and the issuance of such an order, similarly situated litigants in the future will also be without complete and accurate information as to the nature and

extent of the relief available to them within the respondent courts.

Petitioner's appearance personally in this court is required due to his inability to secure counsel willing to undertake the effort and expense required to bring this issue before the court, pro bono. It seems that the professional consensus is generally that although petitioner's arguments appear valid, the apparent growing resort, and abuse of, §1983 actions would likely predispose this court against undertaking a serious consideration of this case and the issues presented for review. Petitioner believes that this is an overly cynical view of his situation. Nevertheless, he feels compelled to emphasize that he does not seek protection for those litigants of the class at issue or any other, who

seek to impede or otherwise abuse the processes of the court. Nor would the relief sought, if granted, effect any such result. It would only serve to ensure that those who proceed, as has petitioner, with appropriate courtesy and conduct and with sufficient ability so as not to impede the administration of justice, or to abuse it, would enjoy the proper observance of the minimum courtesies which they are due.

Because this case concerns the larger rights and interests of the state's citizens and not just those of the petitioner, he would upon the grant of this petition, immediately undertake to secure counsel to ensure the competent representation of those larger rights and interests. He trusts that the grant of this petition would make that task easier

enough to assure this court that his further appearance would be by qualified counsel.

Respectfully submitted,

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APPENDIX

Order and Judgment of the U.S. Court of Appeals for the Tenth Circuit, Case Number 85-1128, Circuit Judges McKay, Doyle, and Seymour presiding, dated December 4, 1985.

In accordance with the 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

Plaintiff-Appellant Edward C. Embury, Jr., appeared pro se in a breach of contract suit filed against him in Colorado state court. He lost, appealed the judgment to the Colorado Court of Appeals, and, after losing in the court of appeals, sought but failed to obtain a writ of certiorari from the Colorado Supreme Court. Embury requested oral argument in both appellate courts;

pursuant to an unpromulgated policy of those courts that no oral argument will be permited in cases where one party is a layman appearing pro se, Embury's requests for oral argument were denied.

Embury, believing that the Colorado courts' rule infringed his Fourteenth Amendment due process rights, filed this 42 U.S.C. § 1983 suit in the United States District Court for the District of Colorado. The district court dismissed Embury's complaint, holding that it failed to state a claim appropriate for federal relief. Embury now appeals that dismissal.

We agree with the district court that Embury failed to state a claim upon which a federal court can grant relief. Colorado state law may give Embury the

right to notice of the conditions under which his appeal will be considered.[1] Even if Embury were to establish a clear state law right to notice concerning the conditions under which he would be granted oral argument, however, a federal court could not grant injunctive or monetary relief against the Colorado courts solely because they violated state law. See Pennhurst State School v. Halderman, _____U.S._____, 104 S.Ct. 900, 919, 921 (1984). Before a federal court could hold the Colorado courts liable under 42 U.S.C. § 1983, Embury would have

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[1] The Colorado Constitution directs the state supreme court to ". . . make and promulgate rules governing practice and procedure in civil . . . cases . . ." Colo. Const. Art. VI, § 21 (emphasis added).

to demonstrate that the courts' no oral argument rule infringed a right guaranteed to him by the constitution or laws of the United States. See Parratt v. Taylor, 451 U.S. 527, 535 (1981).

We find that the Colorado courts' no oral argument rule does not infringe any federally guaranteed rights. Due process does not require that a party be allowed oral argument on appeal. Price v. Johnston, 334 U.S. 266, 286 (1948); United States v. Marines, 535 F.2d 552, 556 (10th Cir. 1976). All that it requires is that a party be afforded the opportunity to make an argument and cite supporting authorities on terms equal to those afforded to the opposing party. E.g., Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969). The Colorado courts gave the appellant the

opportunity to make his argument in written form; this procedure did not prejudice the appellant vis-a-vis his opponent since neither party to the case was permitted to present oral argument. The courts' procedures satisfied the requirements imposed by the Fourteenth Amendment's due process clause.[2] Appellant has therefore failed to set forth a claim upon which a federal court can grant relief. See 10th Cir. R. 17(b).

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

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[2] Similarly, although we have not granted appelant's request for oral argument to this court, the procedures that we have followed in this case satisfy the requirements imposed by the Fifth Amendment's due process clause. Marines, 535 F.2d at 556.

The mandate shall issue forthwith.

Order in the Case of Edward C. Embury, Jr. v. The Colorado Supreme Court, et al., Case Number 85-1128 dated March 13, 1986.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was submitted.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service in the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the

suggestion for rehearing en banc is denied.

Judge Doyle did not participate.

Order of the United States District Court for the District of Colorado, Civil Action Number 84-K-1490, dated November 30, 1984.

KANE, J.

Edward Embury sues the Colorado Supreme Court and the Colorado Court of Appeals under 42 U.S.C. § 1983. He complains that the policy of those courts not to hear oral argument of any case in which a lay pro se litigant appears violates his rights under the Fifth and Fourteenth Amendments to the United States Constitution as well as his right under 28 U.S.C. § 1654 to plead and

conduct his own case personally. Also, he alleges that the Denver District Court and several of its judges have violated his due process rights during the trial of the merits of the underlying claim which is in no way before this court. The Colorado appellate courts have affirmed the decision of Denver District Court. I dismiss as res judicata the claims against the Denver District Court and the several judges thereof. For the following reasons, I also dismiss the claims against the Colorado appellate courts and the judges thereof.

There is no provision in the Constitution or laws of the United States which provides litigants with a right to oral argument of an appellate case. Mr. Embury has presented his litigation in written form to the Colorado Supreme

Court and the Colorado Court of Appeals. Mr. Embury has the right to petition for review of the decisions of the Colorado Supreme Court to the United States Supreme Court. None of these courts has any obligation to permit Mr. Embury, or any party, to present oral argument. The fact that such a court permits oral argument in some cases, but not in others, is of no consequence. We are not dealing with a situation in which one party to a case is allowed argument and the other is not. A rule precluding oral argument when any one of the parties is a layman appearing pro se operates as much for the advantage of the untrained litigant as it does for the efficient conduct of the court's business.

Mr. Embury's reliance on 28 U.S.C. §1654 is misplaced. Aside from governing

only the federal courts, section 1654 states that the parties shall "conduct their cases ... as by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (emphasis added.)

There is no conduct of the defendants that has deprived Mr. Embury of rights, privileges or immunities secured by the Constitution or laws of the United States. His section 1983 claim is lacking under Parratt v. Taylor, 451 U.S. 527, 535 (1981).

IT IS ORDERED that the defendants' motion to dismiss is granted. The request for attorney fees and costs is denied. This complaint and civil action are dismissed with prejudice.

DATED at Denver, Colorado this 30th day of November, 1984.

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Fifth Amendment to the U.S. Constitution

Grand jury - indictment - jeopardy - process of law - taking property for public use. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without just compensation.

Fourteenth Amendment to the U.S. Constitution, Section 1.

Citizenship defined - privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Colorado Constitution, Art. VI, Sec. 21

Rule-making power. The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure

in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for claims not exceeding five hundred dollars and for the trial of misdemeanors.

Colorado Appellate Rule 34, (b)

Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed thirty minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be granted only if good cause therefor is shown. A party is

not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.